IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 91

CHARLES R. FISCHER, Commissioner of Insurance of the State of Iowa, as Receiver for the American Life Insurance Company,

Petitioner,

vs.

AMERICAN UNITED LIFE INSURANCE COMPANY, JOHN G. EMERY, Commissioner of Insurance of the State of Michigan, as Permanent Liquidating Receiver of the American Life Insurance Company of Detroit, Michigan, and DAN E. LYDICK, Receiver of the American Life Insurance Company of Detroit, Michigan,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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AMERICAN UNITED LIFE INSURANCE COMPANY, JOHN G. EMERY, Commissioner of Insurance of the State of Michigan, as Permanent Liquidating Receiver of the American Life Insurance Company of Detroit, Michigan, and DAN E. LYDICK, Receiver of the American Life Insurance Company of Detroit, Michigan,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable Supreme Court of the United States:

Petitioner, Charles R. Fischer, Commissioner of Insurance of the State of Iowa, as Receiver for the American Life Insurance Company, respectfully shows to this Honorable Court:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This case was instituted and summons served under Judicial Code, Sec. 57, (Title 28, Section 118, U. S. C. A.) in the United States District Court for the Southern District of Iowa by petitioner, upon authority and order of the District Court of Polk County, Iowa (R. 369-372).

The purpose in invoking the jurisdiction of the Federal Court was to obtain a decree to determine the status of the parties under the Iowa law, the parties defendant being nonresidents of the State of Iowa, to permit the enforcement of a lien created under the laws of Iowa in favor of policyholders originating in a company created under the laws of Iowa, and to remove the adverse claims, interference with the administration of, and cloud upon the title to, personal property within the Southern District of Iowa made by the nonresident parties (R. 7).

The property consisted of bonds, mortgages, promissory notes, etc., of the face value of over $3,600,000.00 deposited with the Insurance Commissioner of the State of Iowa and in his possession as statutory receiver by decree of the District Court of Polk County, Iowa (R. 199, 342).

Prior to the institution of this suit the Iowa Court had decreed title to the deposited securities vested in the State of Iowa under the Iowa statutes for the benefit of policyholders originating in the Iowa Company for whom the deposit was made under the Iowa statutes, and the securities and their proceeds were to be administered in accordance with the laws of the State of Iowa (R. 309).

The nonresident parties, while making no move to secure these assets through ancillary receivership in Iowa, were making adverse claims to and creating a cloud upon the title to certain of the securities in the possession of the Iowa Receiver, which were secured by real property in states other than Iowa, were making collections and exercising dominion

and control over nonresident debtors without having in their possession the original evidence of indebtedness, and were interfering with and preventing administration upon the securities by the Iowa Court. The District Court granted the relief asked (R. 448). This decision was reversed by the Circuit Court of Appeals by a divided Court (R. 487-508).

THE FACTS.

This controversy arises out of the insolvency of the American Life Insurance Company of Detroit, Michigan. The subject of the controversy is the right to possession for administration of securities of the face value of over $3,600,000.00 deposited with the Insurance Commissioner of Iowa for the benefit of policyholders of the American Life Insurance Company of Des Moines, Iowa, pursuant to the statutes of the State of Iowa (R. 199, 342). The Michigan Company was adjudicated insolvent as of April 12, 1938.

The American Life Insurance Company of Des Moines, Iowa, was a stock corporation organized under the laws of Iowa in 1900 and the American Life Insurance Company of Detroit, Michigan, was a stock corporation organized under the laws of the State of Michigan in 1907 (R. 191, 192). On July 30, 1921, by written contract, the Michigan Company took over the business and assets of the Iowa Company, Exhibit "A" (R. 203). On this date the Iowa Company had on deposit with the Insurance Commissioner of Iowa securities of the face value of $2,930,840.71, pursuant to the requirements of the Iowa statutes, this amount representing the net cash value or legal reserve of the policies then in force of the Iowa Company (R. 192). Supplementary contracts, Exhibits "B" and "C" were entered into between the companies December 27, 1922, and October 24, 1923, to complete the transaction. The substance of each contract is the same. The Insurance Commission of Iowa, pursuant to the statutes of Iowa, consisting

of the Governor, Commissioner of Insurance and Attorney General, approved the contracts. The Insurance Commissioner of Michigan, pursuant to the statutes of Michigan, approved the contracts (R. 203).

Prior to the execution of Exhibit "A", all of the policies of insurance issued by the Iowa Company were signed and delivered at the home office of the Company in Des Moines, Polk County, Iowa, (R. 193). Each had printed on the face of the contract in large letters the following: *"The full reserve on this policy is secured by a deposit of approved securities with the State of Iowa,"* (Exhibit "F"—R. 229). In Section 6, General Provisions of the policy contract, is the provision: *"The legal reserve on this policy shall be invested in approved securities and deposited with the State of Iowa as required by law"*, (Exhibit "F"—R. 233). The Michigan Company did not rewrite the Iowa policies of insurance but issued to each policyholder a document entitled "Certificate of Assumption", which provided as follows: "This is to certify that the above numbered policy issued by the American Life Insurance Company of Des Moines, Iowa, has been assumed according to its terms, provisions and values by the American Life Insurance Company, Detroit, Michigan, *and the American Life Insurance Company, Detroit, Michigan, will carry out all the provisions of said policy and perform all of the obligations therein contained as fully as the same would or should have been performed by the American Life Insurance Company of Des Moines, Iowa,* * * *" (Exhibit "E"—R. 227).

The written agreements between the two companies, Exhibits "A", "B" and "C", each contained the following provisions:

"* * * and covenants and agrees to and with the American Life Insurance Company of Des Moines, Iowa, and to and with each of the holders of policies and contracts herein referred to * * *", and

"5. *The transfer hereby made is subject to the requirements of the statutes of the State of Iowa, relative to the deposit with the Commissioner of Insurance of that State of securities representing the net cash value of outstanding contracts* of life insurance, endowments, or annuities, and it is understood that many of the securities hereby transferred are now in the custody of said Commissioner of Insurance of the State of Iowa by virtue of deposits made in pursuance of such statutes.

"6. It is further agreed by said American Life Insurance Company, Detroit, Michigan, *that the deposits required by the laws of the State of Iowa to be made with the Commissioner of Insurance on all contracts of life insurance, endowments, or annuities issued by said American Life Insurance Company, of Des Moines, Iowa, and hereby reinsured, will be now and hereafter maintained at all times, both in amount and character of securities, as would have been required of said American Life Insurance Company, of Des Moines, Iowa, under the laws of said State of Iowa.* The amount of such deposit required shall be determined by valuation of policies to be made on January first and July first of each year." (R. 207, 211, 217.)

The Michigan Company did not question its obligation to maintain the deposit and regularly made the necessary adjustments to maintain the amounts to equal the net equity or legal reserves for the Iowa policies from 1921 until the insolvency proceedings against it on April 12, 1938 (R. 193).

The Iowa Company, when the agreement between the two companies was made, had on deposit with the Insurance Commissioner of Iowa original securities of the face value of $2,930,840.71, being equal to the net cash value or legal reserve of all policies issued and in force in the Iowa Company. On April 12, 1938, there were on deposit with the Insurance Commissioner of Iowa original securities of the face value of $3,600,205.59. The net cash value or legal reserve of all of the policies of insurance originating in the Iowa Company and in force on March 31, 1938, was $3,574,634.55. By stipulation of the parties, the value of the securities is agreed to

be 25% less than the face value of $3,600,205.59, so that the value of the deposited securities in the possession of the Iowa Receiver is $900,051.39 short of being sufficient to cover the net cash value or legal reserve of the policies originating in the Iowa Company, for whose benefit the deposit was made, (R. 199-200). The stipulation of facts agrees that the value of the deposited securities is less than the net cash value or legal reserve of the policies originating in the Iowa Company.

On April 12, 1938, the Commissioner of Insurance of Michigan took possession of the Michigan Company as custodian and on June 7, 1938, the Circuit Court of Ingham County, Michigan, appointed the Commissioner temporary receiver. The order of the Court contains the following:

"Commissioner of Insurance of the State of Michigan be and is hereby appointed temporary receiver of said defendant company and all and singular the property and assets of every nature wherever situated, held, owned or controlled by the defendant company, * * *" (R. 283).

On September 16, 1939, the Circuit Court for Ingham County, Michigan, entered an order appointing the Commissioner permanent receiver, and contains the following:

"Commissioner of Insurance of the State of Michigan is hereby appointed Permanent Liquidating Receiver of the American Life Insurance Company, a Michigan insurance corporation, and of all of its assets and business wherever situated, and by virtue of the statute in such case made and provided, particularly Section 12266 Compiled Laws of Michigan for 1929, is hereby vested with title to all property, assets and business of said company wherever situated, real, personal and mixed of whatever kind or description, statutory or other deposits or pledges of securities, contracts and rights of action, * * *" (R. 286).

On July 29, 1933, the District Court of Tarrant County, Texas, appointed an ancillary receiver for the assets of the Michigan Company in Texas (R. 290).

On Petition of the Attorney General of Iowa filed June 17, 1938, the District Court of Polk County, Iowa, appointed the Commissioner of Insurance of Iowa temporary receiver of the Michigan Company on said date, and on October 30, 1939, made the appointment permanent (R. 304). Pursuant to the order of Court on June 17, 1938, the Iowa temporary receiver took possession of all of the securities deposited with the Insurance Commissioner of Iowa and said securities are now in his possession as receiver in Polk County, Iowa (R. 200).

On November 17, 1939, the American United Life Insurance Company of Indianapolis, Indiana, entered into a written agreement with the Michigan Receiver for the reinsurance of the business of the Michigan Company, which agreement recognized the questions at issue in this suit (R. 313, 338, 340). Under the agreement with the Indiana Company an initial lien was fixed at 75% of the reserve value of each policy contract with interest at 4% per annum from April 12, 1938.

On April 12, 1938, the securities on deposit with the Insurance Commissioner of Iowa consisted of bearer bonds, real estate mortgages securing promissory notes, real estate contracts, vendor lien notes secured by mortgages and trust deeds, and policy loan notes secured by policy reserves (R. 342). For all of these securities the original instruments evidencing the indebtedness were in possession of the Insurance Commissioner of Iowa as Receiver in Des Moines, Polk County, Iowa.

Sections 9105, 9106, 9107, 9108, 9111, 9112, 9114, Code of Iowa, 1939, provide for an insurance commission of Iowa consisting of the Governor, Commissioner of Insurance and Attorney General to authorize and approve contracts of reinsurance. The authorization and approval of the contracts in this case was by unanimous decision of the Iowa Commission (R. 203, 208, 214). The Insurance Commissioner of

Michigan approved the contracts in accordance with the laws of that state (R. 203, 214).

Sections 8654 and 8655, Code of Iowa, 1939, required the deposit by the Iowa Company of statutory designated securities with the Insurance Commissioner of Iowa equal to the net cash value of all of the policies of the Iowa Company then in force (R. 219, 220). The Michigan Company complied with the provisions of the foregoing statutes without objection up to the time of insolvency (R. 193, 194).

Sections 8664, 8741 and 8741.1 of the Code of Iowa, 1939, provided for the approval, withdrawal and exchange of securities on deposit with the Commissioner of Insurance of Iowa. In compliance with these statutes, the Michigan Company continued withdrawal and substitution of securities from the deposit until the time of insolvency (R. 193, 194).

Section 8665, Code of Iowa, 1939, provides that companies having securities on deposit may, until default, collect the dividends or interest thereon (R. 221). The Michigan Company complied with this statute up to the time of its insolvency.

Sections 8660, 8661 and 8662, Code of Iowa, 1939, provide for an examination, a receiver and a decree (R. 220, 221). The appointment of the Iowa receiver by the District Court of Polk County, Iowa, is in compliance with the foregoing statutes.

Section 8663, Code of Iowa, 1939, provides that the securities on deposit with the Insurance Commissioner of Iowa shall vest in the State for the benefit of the policies on which such deposits were made and for a division of the proceeds among the policyholders or the purchase of reinsurance for their benefit (R. 221). Under this section the title to the deposited securities automatically vested in the State of Iowa on April 12, 1938. Prior to June 17, 1938,

and to the present date there have been no proceedings in Iowa looking to ancillary administration of the deposited securities by the Michigan receiver nor has any claim of any kind or character been asserted by anyone against the deposited assets except by the Insurance Commissioner of Iowa. The lien in favor of the policyholders originating in the Iowa Company was created under this section.

Section 8613.1, Code of Iowa, 1939, requires the Commissioner of Insurance of Iowa to be receiver or liquidating officer (R. 218).

JURISDICTION.

The jurisdiction of this Court to review the judgment and decision of the Circuit Court of Appeals of the Eighth Circuit is expressly provided for by Judicial Code Section 240, as amended by the Act of February 13, 1935, and in this case rests upon the following propositions:

1. The Circuit Court of Appeals has decided an important question of local law, to-wit, the right of the State of Iowa to enforce liens within that State in accordance with its statutes, in a way in conflict with the applicable decisions of the Iowa Court.

Schloss v. *Metropolitan Surety Co.*, 149 Iowa 382, 128 N. W. 384.
State ex rel Gibson v. *American Bonding & Casualty Co.*, 206 Iowa 988, 221 N. W. 585.
Watts v. *Southern Surety Company*, 216 Iowa 150, 248 N. W. 347.
Independent Order of Foresters v. *Scott*, 223 Iowa 105, 272 N. W. 68.
Erie R. R. v. *Tompkins*, 304 U. S. 64, 82 Law Ed. 1188.
Code of Iowa, Sections 8661-8663.

2. The Circuit Court of Appeals of the Eighth Circuit has erroneously decided a federal question, to-wit, the juris-

diction of the Federal District Court in a suit under Section 57 of the Judicial Code, in a way in conflict with the applicable decisions of this Court, in that it has held that the District Court may not grant relief to a receiver duly appointed by an Iowa Court and in possession and ownership of property under such appointment as against non-resident defendants, including a receiver appointed by a sister court but without ancillary status in Iowa, claiming title to such property.

Clark v. *Williard*, 292 U. S. 112, 78 Law Ed. 1160.
Clark v. *Williard*, 294 U. S. 211, 79 Law Ed. 865.
G. W. Mining Co. v. *Harris*, 198 U. S. 561, 49 L. Ed. 1163.
U. S. v. *Knott*, 298 U. S. 545, 80 Law Ed. 1321.
Overby v. *Gordon*, 177 U. S. 214-222, 44 Law Ed. 741.

3. The Circuit Court of Appeals has erroneously so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision, in that it has denied the right of a citizen and resident of the Southern District of Iowa to resort to such District Court to establish his ownership and right of possession to specific property within said district and to secure the removal of clouds on said property, as against nonresident defendants.

Reynolds v. *Stockton*, 140 U. S. 254, 35 Law Ed. 464.
Clark v. *Williard*, 292 U. S. 112, 78 Law Ed. 1160.
Clark v. *Williard*, 294 U. S. 211, 79 Law Ed. 865.

4. The Circuit Court of Appeals of the Eighth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision, in that it has, in effect, denied the validity of the appointment of the petitioner, Fischer, and the jurisdiction of the Iowa Court in making his appoint-

ment for property in Iowa, and has in effect subjected his appointment to collateral attack.

Lion Bonding & Surety Co. v. *Karatz*, 262 U. S. 77, 90, 67 Law Ed. 871.

Mutual Reserve Ass'n v. *Phelps*, 190 U. S. 147, 47 Law Ed. 987.

G. W. Mining Co. v. *Harris*, 198 U. S. 561, 49 Law Ed. 1163.

The decision and decree sought to be reversed was dated and filed February 24, 1941, and is set forth in the record 508-509. The opinion of the Circuit Court of Appeals for the Eighth Circuit was filed February 24, 1941, (R. 488-508). The case is reported in 117 Fed. (2d) page 811.

THE QUESTIONS PRESENTED.

1. The Federal Court for the Southern District of Iowa has jurisdiction under Section 57 of the Judicial Code in a suit begun by a statutory receiver appointed by the Iowa State Court, being authorized by said Court to begin the suit, to determine the status of the parties under the Iowa law, to permit the enforcement of a lien and administration upon personal property within the Southern District of Iowa in the possession of the Iowa Receiver, pursuant to the laws of Iowa, as against nonresident defendants, including the domiciliary receiver appointed by the Michigan State Court, which receiver claims and is asserting title to said personal property.

2. Under Section 8663, Code of Iowa, upon the insolvency of the insurance company, the securities deposited with the Insurance Commissioner of Iowa vested, by operation of law, in the State of Iowa for the benefit of the policyholders for whom such deposits were made, and the Michigan receiver as statutory successor to the company, did

not acquire title to, nor the Michigan state court jurisdiction of, such securities on deposit in Iowa.

3. The petitioner, as Commissioner of Insurance of Iowa, was not a mere contractual custodian, bailee or pledgee, but was statutory trustee and, upon insolvency of the Insurance Company, was appointed statutory receiver to administer, pursuant to statutory directions, the deposited securities for the policyholders for whose benefit the deposit was made, because

(a) Under the statutes of Iowa title to the deposited securities vested by operation of law in the State of Iowa upon the insolvency of the Company, which was adjudicated to be as of April 12, 1938;

(b) The statutes of Iowa provided a protective lien in favor of each individual policyholder originating in the Iowa Company and constituted the petitioner a trustee and receiver to carry out the mandatory provisions of the Iowa statutes and either liquidate the deposit or use the same to purchase reinsurance for such policyholder;

(c) The reinsurance agreements, the policy assumption agreement of the Michigan Company, and the policy contracts originating in the Iowa Company included the statutes of Iowa which inhered in and were a part of each of said instruments.

4. There is no jurisdictional clash with the Michigan receiver which precludes the Federal District Court for the Southern District of Iowa from adjudicating under Section 57 of the Judicial Code, title, right to possession and administration of or foreclosure of a lien against property located in Iowa, because

(a) The rights of the Michigan receiver in the deposited securities are clearly subordinate to those of the lien beneficiaries until such liens have been satisfied under Iowa law;

(b) The fact that the petitioner is a receiver appointed by the Iowa State Court arises from the method

of lien enforcement provided by the Iowa statutes, which provide a substantive means of enforcing such lien rights upon property located in Iowa by vesting of title in the State of Iowa upon insolvency of the Company and appointment of petitioner as receiver to carry out the statutory disposition of the deposit;

(c) The Michigan receiver could have no interest in the deposited securities over the prior lien rights for which the Iowa Commissioner, as receiver, was authorized to act, except to receive any surplus remaining after the lien rights have been satisfied, and since it is admitted that the deposited securities are less in value than the amount of the lien, there is no interest to which the Michigan receiver's right could ever attach.

5. The majority opinion of the Circuit Court of Appeals collaterally attacks the appointment of petitioner as receiver by the Iowa State Court and denies the jurisdiction of the Iowa State Court.

6. The law and local policy the State of Iowa permit a creditor or claimant to proceed against a debtor's assets located within Iowa through appropriate courts even though a receiver may have been appointed for the debtor in the State of the debtor's domicile.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

In addition to and supplementing the jurisdictional grounds for the granting of a writ of certiorari heretofore urged by petitioner, *ante,* page 9, the following are reasons relied upon for the allowance of the writ:

1. The majority opinion of the Circuit Court of Appeals of the Eighth Circuit has erroneously interpreted the nature and purpose of this action, which is brought under Judicial Code Section 57, Section 118, Title 28 U. S. C. A., to prevent interference with the administration upon per-

sonal property in the possession of the Iowa Court where the debtors and properties securing the debts are located outside of the State of Iowa, and to remove adverse claims and clouds upon this personal property within the Southern District of Iowa made by the nonresident defendant parties. The purpose was to have the Federal Court declare the status of the parties under the Iowa law so that the Iowa Court might administer the property without interference and to enforce the specific local liens created by Iowa statutes in accordance with the substantive means provided for enforcing these lien rights upon property located in its jurisdiction. The majority opinion denies petitioner the remedy provided by the Federal statute, nullifies the Iowa statute and in this collateral proceeding determines the lack of jurisdiction of the Iowa Court, all of which is without legal precedent and calls for an exercise of this Court's power of supervision.

The majority opinion of the Circuit Court of Appeals of the Eighth Circuit has rendered a decision in this case on an important question of local law based upon decisions of this Circuit and other Circuit Courts and decisions of the United States Supreme Court, which are correct rules as stated but not authority for the rules announced by the majority opinion under the facts and circumstances of this case, because they are an unwarranted extension of the rules which do not support the conclusions reached. The principal authority cited is the case of *Genecov* v. *Wine*, 8th Cir., 109 Fed. (2d) 265, 267, Cert. denied 310 U. S. 639, wherein the questions involved arise because of a conflict of jurisdiction of a federal court and a state court in the same state and district where the state court had first obtained possession of the *res*. It is not a judicial precedent for a similar rule in this case. Likewise the cases of *Motlow* v. *Southern Holding & Securities Corporation*, 8th Cir., 95 Fed. (2d) 721, 725, and *Holley* v. *General American Life*

Ins. Co., 8th Cir., 101 Fed. (2d) 172, 174, and the case of *Lion Bonding & Surety Company* v. *Karatz*, 262 U. S. 77, 88-90, do not sustain the conclusion of the majority opinion for in each of the cases the essential facts on which the rules are applied are not comparable with the facts upon which this case must be considered.

The majority opinion of the Circuit Court of Appeals ignored the Iowa decisions and statutes and the rule of law which limits jurisdiction of a state court to the boundaries of the state and gives a foreign receiver no jurisdiction of property located outside the state except upon the appointment of an ancillary receiver. The decision of the majority opinion of the Circuit Court of Appeals holds, that the Michigan Court has the exclusive jurisdiction to resolve any controversy over the assets on deposit in the State of Iowa with the Insurance Commissioner and in his possession as receiver by appointment of the Iowa State Court, and this ruling is without support in judicial precedent upon the facts in this case.

2. The majority opinion of the Circuit Court of Appeals for the Eighth Circuit has determined an important question of local Iowa law in a manner directly in conflict with applicable local decisions and statutes of the State of Iowa, in holding that the Michigan Court and not the Iowa Court has jurisdiction and the right to administration of the securities deposited in Iowa with the Insurance Commissioner of Iowa who, as receiver by appointment of the Iowa State Court, is in possession of said securities. The statutes of Iowa create a lien in favor of policyholders originating in the Iowa Company and a substantive method of confirming and enforcing the lien. The Supreme Court of Iowa in the case of *State ex rel Gibson* v. *American Bonding & Casualty Company*, 206 Iowa 988, 211 N. W. 585, states the rule which gives the Iowa Court the right to confirm and enforce the lien rights existing under the Iowa statute for the protection of the policyholders of the Iowa Company.

The majority opinion nullifies the Iowa statutes and decisions.

3. The Circuit Court of Appeals for the Eighth Circuit has decided an important question of local law in a manner directly in conflict with the decisions of the Supreme Court of Iowa and the statutes of the State of Iowa, which has no support whatever in judicial precedent. The sovereignty of the State of Iowa through its statutory enactments is denied the right to provide an independent substantive method of confirming and enforcing lien rights created and existing under the Iowa law upon property located in its jurisdiction and in the possession of a court of the State of Iowa.

4. The majority opinion of the Circuit Court of Appeals has determined an important question of local Iowa law in a manner in conflict with the applicable decisions of this Court in failing to apply the rule stated in the decision of the case of *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, 58 Sup. Ct. 817, 82 Law Ed. 1188, which requires the Federal Court to perform the function of the Iowa State Court in declaring the status of the parties in this case under the Iowa law.

5. The majority opinion of the Circuit Court of Appeals in holding as it does that because of the appointment of the domiciliary receiver by the state court of Michigan, the Federal District Court has no jurisdiction to determine this case, has in effect denied the validity of the appointment of the petitioner as statutory receiver under the laws of Iowa, and has collaterally attacked such appointment and the jurisdiction of the Iowa state court.

6. The majority opinion of the Circuit Court of Appeals for the Eighth Circuit has determined an important question of local Iowa law in a manner directly in conflict with the applicable decisions of the Supreme Court of the United States in ignoring the rule stated in the cases of *Clark* v.

Williard, 292 U. S. 112, 78 Law Ed. 1160, 294 U. S. 211, 79 Law Ed. 865, which permits the enforcement of local liens against a foreign statutory successor of an insolvent company in accordance with the local laws of the state under which the lien was created. The Michigan Receiver had never made application for the appointment of an ancillary receiver in Iowa or made any claims in Iowa to the deposited securities in Iowa at any time prior or since the appointment of a receiver by the State Court of Iowa.

A certified copy of the record in the suit in the United States Circuit Court of Appeals for the Eighth Circuit, including the record, proceedings, opinion and the order and decree of the Appeals Court, is herewith furnished and lodged in the office of the Clerk of this Court in compliance with Rule 38 of this Court.

Wherefore, your petitioner respectfully prays that this Court grant a writ of certiorari under Judicial Code Section 240, as amended, to be issued out of and under the Seal of this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, to remove therefrom for review here the record in the cause therein pending, No. 11,852 Civil, wherein your petitioner is appellee and the respondents appellants, and that the said opinion, judgment and decree of the United States Circuit Court of Appeals for the Eighth Circuit may be reversed by this Court, and that petitioner have such other and further relief in the premises as to this Court may seem equitable and just.

CHARLES R. FISCHER,
Commissioner of Insurance of the State of of Iowa, as Receiver for the American Life Insurance Company,
By JOHN N. HUGHES,
WILLIS J. O'BRIEN,
JOHN N. HUGHES, JR.,
Attorneys for Petitioner.

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

1.

The majority opinion of the Circuit Court of Appeals is in error in denying jurisdiction of the subject matter of this action, which is brought under Section 57 of the Judicial Code and in denying petitioner the right and remedy provided by said statute.

Section 57 of the Judicial Code provides the procedure by which may be enforced as against non-resident defendants any legal or equitable claim to personal property within the district where such suit is brought, and likewise to remove any encumbrance, lien or cloud upon the title to such personal property.

Petitioner, as receiver, appointed by the Iowa State Court, had in his possession original securities and obligations of a face value in excess of $3,600,000.00 (R. 199). The securities included promissory notes secured by mortgages and deeds of trust on real property located in States other than Iowa. The non-resident parties were exercising direction and control over non-resident debtors without having in their possession the original evidences of the debts. Likewise, the non-resident parties were making adverse claims to such securities and creating a cloud upon the title to such personal property. At no time did any of said non-resident parties assert any claims in the Iowa State Court to such securities nor did the Michigan receiver make an application for the appointment of an ancillary receiver in Iowa. The Iowa State Court authorized the petitioner to institute this suit in the Federal Court to the end that the questions involving the right, title and possession of the deposited securities as between petitioner and the non-resident parties claimants might be finally adjudicated. (R. 371.)

Complaint was therefore filed in the Federal District Court in Iowa and summons issued directed to the non-

resident defendants pursuant to Federal statute and rule. The non-resident defendants each appeared and, in their answers, sought affirmative relief. (R. 143, 154, 169.) While the action was instituted as one *in rem*, by the appearances and pleadings of the defendants, the court acquired jurisdiction over their persons.

Franz v. *Buder*, 11 Fed. (2d) 854 (C. C. A. 8), Certiorari denied, 273 U. S. 756, 71 Law Ed. 876, 47 Sup. Court 459.

Ferdig Oil Co. v. *Wilson*, 91 Fed. (2d) 857 (C. C. A. 10).

The pleadings stated the adverse claims to the de osit of securities which are the subject of the suit, and the liens claimed and clouds upon the title to the personal property and the interference by the non-resident defendants in the administration of the property by the Iowa State Court (R. 1-9, 143-148, 148-163, 163-178, 178-190).

Because the personal property and securities involved had their situs and were located within the jurisdiction of the Federal Court in Iowa, it is urged that the Federal District Court had jurisdiction to determine the rights of the parties under the Iowa law and the issues made by the pleadings between all parties. The majority opinion of the Circuit Court of Appeals is erroneous, for, while it recognizes that this suit was brought under the Federal statute, it deprives petitioner of the right and remedy provided. In denying the authority of the Federal District Court to decide the case, the Circuit Court of Appeals takes away the only practicable procedure for determining the issues between petitioner and non-resident parties, without submitting to a multiplicity of actions in courts of several other States.

It is likewise submitted that to permit the Federal District Court in Iowa to decide the case upon its merits did not "interfere with an officer of a state who, under the laws of

the state and the orders of the court of the state, is engaged in administering the property and business of an insurance company chartered by the state." The cases cited in the majority opinion in support of this claimed rule belong to that line of authorities in which a State Court has already taken possession of the assets of a local corporation through the appointment of a receiver and subsequently the Federal Court in the same State is asked to interfere.

Lion Bonding & S. Co. v. *Karatz*, 262 U. S. 77, 67 L. Ed. 871, is a case where the State Court of Nebraska had appointed a statutory receiver for a Nebraska insurance corporation, and the Nebraska Federal Court subsequently was refused the right to appoint a receiver or interfere with the jurisdiction of the Nebraska State Court.

Holley v. *General Am. Life Ins. Co.*, 101 Fed. (2d) 172, (C. C. A. 8), is a case where a Missouri State Court had approved the acquisition of a Missouri life insurance company by the General American Company and subsequently the Federal Court in Missouri refused to consider a case in which it was alleged that the transfer was fraudulent and that a Federal Court receiver should be appointed.

Motlow v. *Southern Holding & Sec. Corp.*, 95 Fed. (2d) 721, is a suit where a statutory receiver was appointed in the State of New York by the State Court there and subsequently a creditor who had already submitted himself to the jurisdiction of the New York State Court, brought suit in the Missouri Federal Court seeking to set aside alleged fraudulent transfers and the Federal Court refused to take jurisdiction and held that the plaintiff failed to show the statutory liquidator had abandoned the alleged cause of action and that he had exhausted his remedies in New York.

Genecov v. *Wine*, 109 Fed. (2d) 265, (C. C. A. 8), is the case cited frequently by the majority of the Circuit Court of Appeals in the decision below and is one in which the

Arkansas State Court had appointed a receiver, plaintiff had proved his claim as a creditor in the Arkansas State Court and then plaintiff attempted, in the Arkansas Federal Court, to secure payment of his claim in full by means of a garnishment, and the Federal Court rightly refused to interfere with the State Court's administration of the receivership. Under no basis can it be contended that in the case at bar, the review of which is here sought by this petitioner, is there a clash between a Federal Court and a State Court within the same State which has already undertaken administration of the receivership assets.

It has long been recognized that a Federal Court has jurisdiction of an action to foreclose a mortgage on property of a corporation for which a State Court has appointed a receiver.

> *Empire Trust Co.* v. *Brooks,* 232 Fed. 641, approved in *Harkin* v. *Brundage,* 276 U. S. 36, 44, 72 L. Ed. 457, 461.

So also it has been held by the Circuit Court of Appeals for the Eighth Circuit that after the appointment of a receiver by a State Court, the trustee under a mortgage securing certain bondholders can foreclose such mortgage in the Federal Court.

> *Rogers* v. *Paving District,* 84 Fed. (2d) 555.

Section 57 of the Judicial Code is the proper method for enforcement of petitioner's rights.

> *Bede Steam Shipping Co.* v. *N. Y. Trust Co.,* 54 Fed. (2d) 658.

Another reason why there can be no interference with the jurisdiction of the Michigan Court and authority of its receiver by any action of the Federal Court in Iowa, is the fact that the jurisdiction of the Michigan Court is limited by the territorial boundaries of that State. The personal property involved in this suit under Section 57 of the Judicial

Code has its situs in the State of Iowa and has never been within the jurisdiction of the Michigan Court or its receiver. The sovereignty of the State of Michigan and the jurisdiction of its courts do not extend to embrace property not situated within the territorial jurisdiction of the State. *Overby* v. *Gordon*, 177 U. S. 214, 44 L. Ed. 741.

Petitioner respectfully urges that the majority opinion of the Circuit Court of Appeals has misconceived the nature and purpose of this action and that this Court should review the opinion and decision to determine whether or not the Circuit Court of Appeals erroneously deprived petitioner of his rights under the Federal statute.

2.

Under Section 8663, Code of Iowa, the securities on deposit with the Insurance Commissioner of Iowa, upon insolvency of the company, vested immediately by operation of law in the State of Iowa for the benefit of the policyholders for whom such deposits were made, and the Michigan receiver as statutory successor to the company did not acquire title to, nor the Michigan state court jurisdiction of, the securities on deposit in Iowa.

The purpose of this suit was to obtain a decree in the Federal Court to determine the rights of the parties under the Iowa law as between the petitioner and non-resident parties defendant, to prevent active interference by the non-resident defendants with administration upon the personal property by the Iowa State Court, to remove adverse claims and a cloud upon the title to personal property within the Southern District of Iowa so as to permit the enforcement of liens created under the laws of Iowa in favor of policyholders whose contracts originated in the Iowa Company prior to the contracts with the Michigan Company.

The decree of the Federal District Court decided these issues in favor of your petitioner and held that the Court had

jurisdiction of the parties and the subject matter. The Court below, referring to jurisdiction to appoint an Iowa receiver for the Iowa assets, said (R. 445):

"I see nothing in the contention of the defendants that this court and the courts of Iowa are without jurisdiction in this proceeding. As I have heretofore held, and as I have tried to point out herein, the state is attempting to protect by a primary receivership property in the hands of the state. * * * The Iowa receiver has the sole and exclusive right to administer these funds because of the statutes of Iowa, and because of the reinsurance contract."

Under decision and decree of the Iowa State Court, filed October 30, 1939. (R. 304) title to all securities deposited with the Commissioner of Insurance vested in the State of Iowa pursuant to Sections 8661-8663 of the Code.

Section 8661 Code of Iowa 1939 provides as follows:

"*Injunction—receivership—dissolution.* If upon such examination the commissioner is of the opinion that the company is insolvent, or that its condition is such as to render its further continuance in business hazardous to the public or holders of its policies, he shall advise and communicate the facts to the attorney general, who shall at once apply to the district court of the county or any judge thereof, where the home office of a domestic company or an agency of a foreign company is located, for an injunction to restrain the company from transacting further business except the payment of losses already ascertained and due, until further hearing, and for the appointment of a receiver, and, if a domestic company, for the dissolution of the corporation. The judge of such court may grant a preliminary injunction with or without notice, as he may direct."

Section 8662 Code of Iowa 1939 provides as follows:

"*Decree.* The court, on the final hearing, may make decree subject to the provisions of Section 8663 as to the appointment of a receiver, the disposition of the deposits of the company in the hands of the commissioner, and its dissolution, if a domestic company."

Section 8663 Code of Iowa 1939 provides as follows:

"*Securities.* The securities of a defaulting or insolvent company, or a company against which proceedings are pending under Sections 8661 and 8662, on deposit shall vest in the state for the benefit of the policies on which such deposits were made, and the proceeds of the same shall, by the order of the court, upon final hearing, be divided among the holders thereof in the proportion of the last annual valuation of the same, or at any time be applied to the purchase of reinsurance for their benefit."

The decree of the Iowa State Court, as stated in the majority opinion of the Circuit Court of Appeals, vested title to the deposited securities as of June 17, 1938, the date of the filing of the petition for a receiver in Iowa, which decree specifically referred to the fact that proceedings were pending on said date under Sections 8661 and 8662, (R. 304). This finding for vesting the title on said date being a separate ground included in Section 8663 in addition to the insolvency provision, demonstrates the fixing of the date by the Iowa State Court's decree is not incorrect nor is it inconsistent with the vesting of the title by operation of law upon insolvency of the Company as provided by the statute.

The Michigan Company was adjudicated to be insolvent as of April 12, 1938, by the Federal District Court and the Michigan State Court. It is petitioner's position that, under Section 8663 Code of Iowa 1939, quoted above, upon insolvency, title to the securities on deposit with the Commissioner of Insurance of Iowa, by operation of law, immediately vested in the State of Iowa for the benefit of the policies on which such deposits were made, which were the policies issued by the Iowa Company prior to the reinsurance contract. The majority opinion of the Circuit Court of Appeals stated:

"The Michigan Court decreed that under the statutes of that State (Section 12,266 Compiled Laws of Michigan 1929),

title to all the assets of the Michigan Company vested in the Commissioner of Insurance of Michigan as receiver on April 12, 1938" (R. 499).

The date of the decree was September 16, 1939, (R. 282-286). The Michigan statute quoted in the Court's statement did not have the provision similar to the Iowa statute but provided for the vesting of title by operation of law by judicial proceeding as of the date of the order directing the Commissioner to liquidate the business of the Company, which was September 16, 1939. The majority opinion of the Circuit Court of Appeals, therefore, is erroneous in holding:

"We think that on April 12, 1938, the securities belonging to the Michigan Company on deposit in Iowa were legally in the possession, actual or constructive, of the Michigan Company, and that therefore the Michigan Court, through the insolvency proceedings commenced in that State, acquired jurisdiction to administer them and to determine what the rights of policyholders, creditors and all others claiming interests in them were. Actual possession of the deposited securities by the Commissioner of Insurance of Iowa which on April 12, 1938, were not being held adversely to the Michigan Company, would not prevent the Michigan Court from acquiring such jurisdiction" (R. 499).

In order to reach the conclusion above stated, the Circuit Court of Appeals ignored and refused to apply the law of the State of Iowa which vested the title in the State of Iowa immediately upon insolvency. Since, for the purpose of administration and enforcement of local liens created by the laws of Iowa, the title vested in the State of Iowa before adjudication by the Michigan State Court, the Michigan Court was prevented from acquiring jurisdiction of the deposited securities in the actual possession of the Commissioner of Insurance of Iowa on April 12, 1938.

The foregoing record is convincing in demonstrating the error of the majority opinion and decision of the Circuit Court of Appeals, in that it is a denial of the jurisdiction of

the Iowa State Court and in effect nullifies the statutes and laws of the State of Iowa. It further demonstrates a collateral attack on the jurisdiction of the Iowa State Court contrary to the applicable rules of law.

3.

The majority opinion and decision of the Circuit Court of Appeals is in error in holding that the Commissioner of Insurance of Iowa was a mere contractual custodian, bailee or pledgee of the securities deposited with him because, under the Statutes of Iowa, he was a statutory trustee and, upon insolvency, the statutory receiver to administer the deposited securities for the policyholders for whose benefit the deposit was made, title to the deposited securities being vested in the State of Iowa by operation of law as of April 12, 1938, and because the statutes and laws of the State of Iowa inhered in and were a part of the policy contract, the assumption agreement and the reinsurance contract.

The majority opinion and decision of the Circuit Court of Appeals is erroneous, in holding that the relation between the Commissioner of Insurance of Iowa as Receiver of the deposited securities of the Michigan Company was contractual and his position was to be interpreted only in the light of the reinsurance agreements. The statutes of Iowa, Section 8613.1, require the Commissioner of Insurance to be receiver or liquidating officer, (R. 218). The statutes are mandatory and were a part of the Iowa Company policy contract, the assumption agreement of the Michigan Company, and the reinsurance contract entered into between the Iowa Company and the Michigan Company. The statutes and laws of Iowa inhere in the policy contract, the assumption agreement and the reinsurance contract, and the majority opinion of the Circuit Court of Appeals is wrong in holding:

"The Commissioner of Insurance of Iowa on April 12, 1938, had the actual physical custody of the securities of the Michigan Company on deposit in Iowa, but he had no title

to them and neither he nor the State of Iowa had or claimed any proprietary interest in them. Whatever interest the Commissioner had *was contractual* and was concededly for the benefit of the holders of policies of the Michigan Company which originated in the defunct Iowa Company. The Iowa Commissioner was, with respect to the securities on deposit with him, a custodian, bailee or pledgee, depending upon what function he was required to perform under the *reinsurance agreements* pursuant to which the Michigan Company established and maintained the deposit" (R. 499).

This Court has recognized the principle that statutes and laws of the state where a contract is entered into become a part of a contract of insurance. This includes statutes relating to receivership and liquidation. *Whitfield* v. *Aetna Life Ins. Co.*, 205 U. S. 489, 51 Law Ed. 895 at 898. In this case this Court said:

"* * * If it does business at all in the state, it must do so subject to such valid regulations as the state may choose to adopt. Even if the statute in question could be fairly regarded by the court as inconsistent with public policy or sound morality, it cannot, for that reason alone, be disregarded; for it is the province of the state, by its legislature, to adopt such a policy as it deems best, provided it does not, in so doing, come into conflict with the Constitution of the state or the Constitution of the United States. There is no such conflict here."

The rule has been recognized many times by the Circuit Court of Appeals for the Eighth Circuit. *Continental Casualty Co.* v. *Agee*, 3 Fed. (2d) 978, C. C. A. 8th, 1924, where the insurance contract had been entered into in the State of Utah and the Court said:

"The statute, on familiar rules of construction, entered into and became a part of every life insurance contract effected after its enactment by companies doing business in Utah."

And in *Great Southern Life Insurance Company* v. *Jones*, 35 Fed. (2d) 122, C. C. A. 8th, 1929, the Court said:

"It is well settled that statutory provisions are part of the policy. 'The courts appear to be unanimous in holding that, as to those policies to which the statute is applicable, and statutory provisions ought to be given the same force and effect as if they were written in fact in the policy.' "

And in *American Surety Company* v. *Bankers' and Loan Assn.*, 67 Fed. (2d) 803 (C. C. A. 8th), the Court says:

"The Nebraska statute in force when the contract in suit was made, must, of course, be read into, and must be considered as forming a part of, the surety contract."

The decisions of the Supreme Court of Iowa are in harmony with the foregoing rules. In *Taylor* v. *Merchants and Bankers Ins. Co.*, 83 Iowa 402, 49 N. W. 994, the Court says:

"This statute was enacted before the policy in suit was issued and therefore became a part of the contract of the parties."

The majority opinion of the Circuit Court of Appeals is founded upon the erroneous premise that the relation between the Commissioner of Insurance of Iowa as Receiver and the Michigan Company as to the deposited securities was purely contractual and to be interpreted only in the light of the reinsurance agreements. It is upon this erroneous theory that the Court refuses to recognize and apply the statutes and laws of Iowa which create a lien against the deposited securities and the right of confirming and enforcing the lien upon property located in the State of Iowa. The majority opinion of the Circuit Court of Appeals in reaching its conclusion also fails to recognize and apply the rules of law noted above which establish that the laws of the State of Iowa inhere in the policy contracts, the assumption agreement and the reinsurance contract. The majority opinion is therefore in error in holding that the agreement here was purely contractual and that the Commissioner of Insurance was merely a custodian, bailee or

pledgee, dependent upon what function he was required to perform under the reinsurance agreements. Since title vested by operation of law in the State of Iowa the Insurance Commissioner became trustee with title as statutory designated liquidating officer of the State of Iowa for the deposited securities. The statutes of Iowa required him to administer the deposited securities in accordance with the means provided, which created the lien and provided the method of enforcement. The statutes were mandatory. Under the facts in this case the reinsurance agreements must be considered as both contractual and statutory. In fact, the best evidence that the agreements are contractual and statutory is found in the documents. The policies of insurance issued by the Iowa Company each had printed on the face of the contract the following: *"The full reserve on this policy is secured by a deposit of approved securities with the State of Iowa,"* (Exhibit "F", R. 229). In Section 6, General Provisions of the policy contract, is the provision: *"The legal reserve on this policy shall be invested in approved securities and deposited with the State of Iowa as required by law,"* (Exhibit "F", R. 233). The Michigan Company did not rewrite the Iowa policies but issued to each policyholder a document entitled "Certificate of Assumption", which provided as follows:

"This is to certify that the above numbered policy issued by the American Life Insurance Company of Des Moines, Iowa, has been assumed according to its terms, provisions and values by the American Life Insurance Company, Detroit, Michigan, *and the American Life Insurance Company, Detroit, Michigan, will carry out all the provisions of said policy and perform all of the obligations therein contained as fully as the same would or should have been performed by the American Life Insurance Company of Des Moines, Iowa,* * * *" (Exhibit "E", R. 227).

The written agreements between the two companies each contained the following provisions:

"* * * and covenants and agrees to and with the said American Life Insurance Company, of Des Moines, Iowa, and to and with each of the holders of the policies and contracts herein referred to, * * *" and

"5. *The transfer hereby made is subject to the requirements of the statutes of the State of Iowa, relative to the deposit with the Commissioner of Insurance of that State of securities representing the net cash value of outstanding contracts* of life insurance, endowments, or annuities, and it is understood that many of the securities hereby transferred are now in the custody of said Commissioner of Insurance of the State of Iowa by virtue of deposits made in pursuance of such statutes.

"6. It is further agreed by said American Life Insurance Company, Detroit, Michigan, *that the deposit required by the laws of the State of Iowa to be made with the Commissioner of Insurance on all contracts of life insurance, endowments, or annuities issued by said American Life Insurance Company, of Des Moines, Iowa, and hereby reinsured, will be now and hereafter maintained at all times, both in amount and character of securities, as would have been required of said American Life Insurance Company, of Des Moines, Iowa, under the laws of said State of Iowa.* The amount of such deposit required shall be determined by valuation of policies to be made on January first and July first of each year."

When the Iowa statutes and laws are considered, we believe that it must be held that the interest of the Commissioner of Insurance of Iowa and the State of Iowa was more than contractual and that his possession with respect to the securities on deposit was that of a trustee, and that he and the State of Iowa not only claimed but had a proprietary interest, and the securities were being held adversely to the Michigan Company for the following reasons:

1. Under the Iowa statutes the title to the deposited securities, by operation of law, vested in the State of Iowa upon the insolvency of the company, which was adjudicated to be insolvent on April 12, 1938.

2. The statutes of Iowa made the Insurance Commissioner of Iowa a trustee of the deposited securities for the purpose of enforcing the protective lien in favor of each individual policy holder of the Iowa Company prior to sale of the Company in 1921.

3. The Iowa statutes and laws inhere in the policyholders' contracts, the assumption agreement and the reinsurance agreement, which the Michigan Company agreed to complete in accordance with the statutes of Iowa, the same as if the Iowa Company had remained a domestic company.

4. The transaction substituted the Michigan Company for the Iowa Company in the performance of every obligation existing under the policies and agreements for the policies originating in the Iowa Company pursuant to the provisions of the statutes of Iowa.

5. The statutes of Iowa were mandatory and enjoined the duties upon the Commissioner of Insurance of Iowa with respect to all of the deposited securities.

The Circuit Court of Appeals, under the rules of law in the case of *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, 82 Law Ed. 1188, was required to consider and apply the decisions of the Supreme Court of Iowa and the statutes of the State of Iowa, and the failure to do so contravenes the decisions of this Court and the Supreme Court of Iowa. Under the statutes and decisions the Circuit Court of Appeals must have held that the Iowa Court was authorized to administer the deposited securities in Iowa for the benefit of the policyholders for whom the deposit was made; that the deposit was originally made and maintained in compliance with the requirements of the Iowa law and under the statutes which became a part of each policy issued by the Iowa Company; that upon insolvency, April 12, 1938, title to the deposited securities vested in the State of Iowa and constituted the Commissioner successor in right for the policyholders and

trustee with title by operation of law as statutory liquidating officer; that the policy contracts issued by the Iowa Company provided and required the deposit of approved securities with the State of Iowa to protect the legal reserve of said policies, and created the lien which is now sought to be enforced under the Iowa statutes; that the contracts under which the Michigan Company assumed the business of the Iowa Company required the Michigan Company to maintain the deposit in compliance with the laws of the State of Iowa for the benefit of the holders of Iowa policy contracts; that the Michigan Company's certificate of assumption issued to each Iowa policy holder obligated the Michigan Company to carry out all of the provisions of the Iowa policy contract the same as if performance were made by the Iowa Company, and that the reinsurance agreement included the maintenance of the deposit in Iowa for the benefit of the Iowa policyholders, which condition was imposed by the Insurance Commission of Iowa. Had the majority opinion of the Circuit Court of Appeals considered the foregoing propositions and properly applied the controlling rules of law, the decision or the reasoning upon which it is based could not be justified. These facts support the jurisdiction of the Federal Court to declare the status of the parties under the Iowa law. The dissenting opinion of the Circuit Court of Appeals is correct in supporting the jurisdiction of the Federal Court and gives proper consideration to the applicable rules of law.

The District Court had jurisdiction of the subject matter to determine the rights of the parties under the statutes and laws of the State of Iowa, and for the reasons urged this Court should accept this case for review.

4.

The majority opinion of the Circuit Court of Appeals is erroneous in holding there is a jurisdictional clash between the Michigan and Iowa courts in this case.

The case of *Erie R. R. Co.* v. *Tompkins,* 304 U. S. 64, 58 Sup. Ct. 817, 82 Law Ed. 1188, establishes the rule applicable in this case that, it was the duty of the Federal Court to declare and give effect to Iowa law in the same manner as the Courts of Iowa would have been obliged to do.

The dissenting opinion of the Circuit Court of Appeals discussing this question and the *Tompkins* case stated:

"Here the Federal Court was simply asked to perform the function of an Iowa state court in declaring the status of the parties under the Iowa law. This it clearly had jurisdiction to do and owed the duty of doing. No uncertainty could exist under the law of Iowa as to the lien rights against the deposit. The State of Iowa had a sovereign right to provide a substantive means of enforcing these lien rights, to which its laws had given birth, upon property located in its jurisdiction, irrespective of whether any Michigan receivership ever existed. In the exercise of their substituted jurisdiction, it was the duty of the Federal Courts in this case to declare and give effect to Iowa law in the same manner as the courts of Iowa would have been obliged to do" (R. 507, 508).

This is the correct rule to apply in this case. The majority opinion of the Circuit Court of Appeals is erroneous in failing to apply the rule established by the *Tompkins* case, *supra,* and in so failing to recognize and apply the rule fails to recognize and apply the statutes and rules of law of the Supreme Court of Iowa. The statutes of Iowa created the liens against the deposited assets and provided a means of enforcing these liens, (R. 218-226).

That the nature of this case was misconceived by the majority of the Circuit Court of Appeals is evidenced by the following quotations from the majority opinion:

"The Iowa Receiver is of the opinion that it would be more advantageous for the holders of policies which originated in the Iowa Company to have the securities of the Michigan Company, on deposit in Iowa, administered by him in Iowa for the benefit, rather than to participate equally with the other policyholders of the Michigan Company in the reinsurance and management agreement with the Indiana Company made by the Michigan Receiver in the Michigan insolvency proceedings" (R. 497).

"This action is directed at securing for a group of policyholders of the Michigan Company scattered throughout some forty-two states and several foreign countries, what the Commissioner of Insurance of Iowa conceives they are entitled to under the reinsurance agreements by which they become policyholders of the Michigan Company" (R. 500).

The Iowa statutes are mandatory and the duties of the Commissioner of Insurance of Iowa as Receiver are defined. The opinion and conception of the Commissioner is wholly immaterial, and the statements of the majority opinion of the Circuit Court of Appeals are due to the fact that the statutes of Iowa and its decisions have not been recognized and applied. The statements are an attempt to support the conclusion that the relation between the parties is purely contractual, whereas it must be considered both contractual and statutory.

The majority opinion of the Circuit Court of Appeals is erroneous in injecting in its reasoning to reach its conclusion another element which is clearly wrong. The majority opinion states:

"There can be no practical justification for liquidating or reinsuring the business of the Michigan Company in segments or subjecting the same policyholders and the assets in which they are beneficially interested to the jurisdiction of two or three different courts working at cross purposes" (R. 500).

This statement demonstrates a misconception of the facts and the law applicable and arises from the fact that the

majority opinion and decision of the Circuit Court of Appeals fails to recognize the provisions of the Iowa statutes and decisions of the Supreme Court of Iowa. It has fallen in error because the fact that the Iowa Commissioner has been constituted a receiver by the Iowa Courts does not involve a basic jurisdictional clash with the Michigan Courts for the following reasons:

1. The rights of the Michigan Receiver in the Iowa deposit securities are clearly subordinate to those of the lien beneficiaries until the existing liens have been satisfied under Iowa law.

2. The question between the receiverships arises out of the method of lien enforcement provided by the statutes of the State of Iowa.

3. The only right of the Michigan Receiver would be to receive any remaining surplus from the securities after the lien rights have been established and it is admitted in the stipulation of facts between the parties that the deposited securities are not equal in value to the legal reserve or net cash value of the policies of the Iowa Company upon which the lien was created by the Iowa law (R. 199). In other words, the Michigan Receiver under the record facts has no interest in the deposited securities because there is no surplus over and above paramount prior lien rights of the Iowa policyholders for whom the Iowa Commissioner of Insurance as Receiver is authorized to act.

The dissenting opinion of the Appeals Court correctly analyzes and supports the foregoing conclusions. The reasoning is sound and correct and should be supported upon a review of this case.

5.

The majority opinion and decision of the Circuit Court of Appeals is a collateral attack upon the appointment of petitioner as receiver by the Iowa state court, and a denial of the jurisdiction of the Iowa state court.

The majority opinion of the Appeals Court holds:

"The Michigan Court in appointing a statutory receiver under the laws of Michigan necessarily ruled that it had power to do so and its determination in that regard is not subject to collateral attack either in the court below or in this court" (R. 498).

and,

"Our conclusion is that the court below lacked the jurisdiction because the Michigan Court had first acquired jurisdiction of the securities deposited in Iowa. But even if that conclusion were not justified, we would still be of the opinion that the court below could not be called upon to decide which of the two state courts has the right to administer these assets of the Michigan Company and to determine controversies respecting them. The decrees and rulings of these two state courts relative to their respective jurisdictions are not subject to review or to collateral attack in a federal court" (R. 502).

Petitioner agrees the rule of law, that the respective jurisdictions of the Michigan and Iowa Courts are not subject to review or to collateral attack in a Federal Court, is correct. The error is that the Circuit Court of Appeals in stating, "our conclusion is that the court below lacked jurisdiction because the Michigan Court had first acquired jurisdiction of the securities deposited in Iowa," is incorrect because it is a collateral attack on the jurisdiction of the Iowa State Court and is an erroneous conclusion of law under the facts and law applicable in this case.

The majority opinion of the Circuit Court of Appeals further states:

"If, by reason of the reinsurance agreements and the laws of Iowa, the Iowa Court has sole jurisdiction over the securities of the Michigan Company on deposit in Iowa, as appellee contends, it is the duty of that court to exercise it. If the Michigan Court, on the other hand, has such jurisdiction, *as we think it has*, it must resolve the controversy over these assets" (R. 503).

This statement of the Court is a collateral attack, contrary to its own pronouncement of the correct rule, upon the jurisdiction of the Iowa State Court and is particularly objectionable as an attempt to decide the merits of the subject matter of the suit over which it holds it has no jurisdiction.

A state court is limited in its jurisdiction to the territory of the sovereignty creating the court. A receiver is an officer of that court. It necessarily follows that the court appointing the receiver can only enforce its orders within its jurisdiction.

Overby v. *Gordon*, 177 U. S. 214, 222, 44 Law Ed. 741.

The decree appointing a receiver in one state will not of itself bind property in another state. Every jurisdiction in which it is sought by means of a receiver to subject property to the control of the court has the right to determine for itself who the receiver shall be. It may make such distribution of the funds realized within its own jurisdiction as will protect the rights of local parties interested therein, and not permit a foreign court to prejudice the right of local creditors by removing assets from the local jurisdiction. When the administration extends to assets located in several jurisdictions, it is often convenient to apply in advance for the assistance of the different courts. When such application is made, the court to which it is addressed exercises its own jurisdiction. *G. W. Mining Co.* v. *Harris*, 198 U. S. 561, 49 Law Ed. 1163; *Fowler* v. *Osgood*, 141 Fed. 20; *Sands* v. *E. G. Greeley & Co.*, 88 Fed. 130.

When a court other than that of a domiciliary receiver appoints a receiver, the officer becomes its officer and is completely amenable to its control. His title to assets within the jurisdiction is derived from its decree or the statute of the state and does not depend on comity. The assets are in its custody and are to be disposed of as equity and the ordinary administration of justice requires. Its judgment and decree in respect to these assets must be accepted as conclusive by all courts, including the court appointing the domiciliary receiver. *Reynolds* v. *Stockton*, 140 U. S. 254, 35 L. Ed. 464.

So long as Fischer's appointment is not set aside by the court of appointment, it may not be collaterally attacked. This is the elementary rule recognized and followed without exception by the courts. It is illustrated by the case of *United States* v. *Knott*, 298 U. S. 545, 80 Law Ed. 1321, where the United States intervened in a receivership other than the domiciliary receivership, and enforced its claim against the assets in the ancillary receivership because it had a lien thereon. It is elementary that the appointment of a receiver of the assets of a bankrupt in the state other than the domicilary receiver cannot be collaterally attacked. Fischer has been appointed by the Iowa Court receiver of the deposit in its jurisdiction. This appointment is conclusive as against collateral attack. *Lydick* v. *Neville*, 287 Fed. 479; *Vallery* v. *D. R. & G. Ry.*, 236 Fed. 176; *A. W. and L. Co.* v. *Towle*, 245 Fed. 706.

Since the court of Iowa has the right to decide for itself whether a receiver is desirable for the Iowa deposit, this finding that the appointment is necessary is conclusive. The only review of this appointment must be by timely application to the appointing court or by appeal.

Since the majority opinion and decision of the Circuit Court of Appeals is clearly a collateral attack on the Iowa State Court's jurisdiction, this case should be reviewed and reversed.

6.

The majority opinion and decision of the Circuit Court of Appeals has determined an important question of local Iowa law in a manner directly in conflict with the applicable decisions of this court and the law of the State of Iowa which permit a lienholder or creditor to proceed against an insolvent debtor's assets in the State of Iowa even though a receiver may have been appointed in the state of the insolvent's domicile.

The majority opinion and decision of the Court of Appeals is based upon the conclusion and authorities in the following quotation:

"It is certain that, from and after April 12, 1938, the Commissioner of Insurance of Michigan, by virtue of the laws of Michigan and of the orders of the Michigan court in the insolvency proceedings, was the statutory successor of the insolvent Michigan Company, and as such had title to all of its assets wherever situated. *Relfe* v. *Rundle*, 103 U. S. 222, 225; *Clark* v. *Williard*, 292 U. S. 112, 120; *O'Neil* v. *Welch*, 4 Cir., 245 F. 261, 268. The Michigan court, on April 12, 1938, acquired jurisdiction over all of the property and business in the actual and constructive possession of the Michigan Company, and the exclusive right to determine all controversies respecting such property and business, since no other court had then taken possession of any of the assets of the Company" (R. 498).

While petitioner does not concur in the factual conclusion and asserts that by operation of law under the Iowa statute the title to the securities deposited in Iowa vested in the State of Iowa before title or actual or constructive possession was had by the Michigan Receiver, under the rules laid down by this Court in the case of *Clark* v. *Williard*, this question becomes immaterial, for the right to determine and enforce the liens existing against the deposit, is within the jurisdiction of the Iowa State court which has taken possession by legal process of the deposited securities for that purpose. It is admitted in the record that the Iowa State court and its Receiver are in possession of the securities deposited with

the Insurance Commissioner of Iowa (R. 200). It is admitted in the record that the value of the deposited securities is insufficient to satisfy the lien which the laws of Iowa created and which the Iowa State Court is seeking to protect and enforce (R. 199). The case of *Clark* v. *Williard* was first before this Court in 292 U. S. 112, 78 Law Ed. 1160, and the Court held:

"That under the statutes of Iowa the liquidator was the successor to the corporation and not a mere custodian, and that in ruling to the contrary the Supreme Court of Montana had denied full faith and credit to the statutes of a sister state."

The controversy arose over conflicting claims to the Montana assets of an Iowa corporation, where judgment creditors of the corporation were insisting upon the right to levy an execution against the Montana assets of such corporation, and when the case was first before this Court the Supreme Court of Montana had given priority to the judgment creditors placing its ruling upon the ground that the petitioner, the foreign liquidator, was not a successor to the corporation but a chancery receiver with title, if any, created by the Iowa decree. Upon the reversal of the case the Court states:

"The question was then an open one whether there was any local policy, expressed in statute or decision, whereby the title of a statutory successor was to be subordinated to later executions at the suit of local creditors. As to that question the Supreme Court of Montana would speak the final word."

Clark v. *Williard*, 292 U. S. 112, 123; 78 Law Ed. 1160 at 1167.

Thereafter the Supreme Court of Montana reconsidered the conflicting claims and held that the local policy of the state permitted attachments and executions against insolvent corporations, foreign and domestic, and that this rule will prevail against a statutory successor clothed with title to the assets just as much as against the corporation itself, or the

trustee upon dissolution or a chancery receiver. In reviewing the foregoing rule this Court in the second appeal of the case of *Clark* v. *Williard*, 294 U. S. 211, 79 Law Ed. 865, held:

"Every state has jurisdiction to determine for itself the liability of property within its territorial limits to a seizure and sale under the process of its court." and

"Montana does not challenge the standing of this foreign liquidator as successor to the dissolved corporation or as owner of its assets. On the contrary, his standing and ownership are now explicity conceded. All that Montana does by the decree under review is to impose upon such ownership the lien of judgments and executions in conformity with local law. In this there is no denial to the statutes of Iowa or to its judicial proceedings of the faith and credit owing to them under the Constitution of the United States."

In further discussing the issues the Court states:

"Some states prefer a rule of equal distribution and compel the local suitor to yield to the statutory successor, though at times with precautionary conditions. (Citing cases.) Other states give the local creditor a free hand with the result that he may seize what he can find, though the assets of the debtor are dismembered in the process. (Citing *Schloss* v. *Metropolitan Surety Co.*, 149 Iowa 382, 128 N. W. 384, and other cases.) Choice is uncontrolled, as between one policy and the other, so far as the Constitution of the nation has any voice upon the subject. Iowa may say that one who is a liquidator with title, appointed by her statutes, shall be so recognized in Montana with whatever rights and privileges accompany such recognition according to Montana law. For failure to give adherence to that principle we reversed and remanded when the case was last before us. *Iowa may not say, however, that a liquidator with title who goes into Montana may set at naught Montana law as to the distribution of Montana assets, and carry over into another state the rule of distribution prescribed by the statutes of the domicile.*"

Paraphrasing the decision of this Court, as applied to the instant case, "Michigan may not say that a statutory liquidator appointed by the Michigan State Court may set aside Iowa

law as to distribution of Iowa assets, and carry over into Iowa the rule of distribution prescribed by statutes of the domicile, Michigan."

Surely with the property in the custody of the Iowa State Court for the exclusive purpose of enforcing the lien against it for the benefit of policyholders for whom the deposit was made as adjudicated in the judgment and decree of the Iowa State Court (R. 304), the foregoing rules announced by this Court would be decisive of the question. The erroneous premise and conclusion of the majority opinion of the Court of Appeal is obvious. Since this Court has decided the very question involved here, the Court of Appeals must have been in error in denying jurisdiction in the Federal Courts to determine the status of the parties under Iowa law in the enforcement of the paramount liens created against the Iowa Deposit by the Iowa statutes.

In the case of *Schloss* v. *Metropolitan Surety Company*, 149 Iowa 382, 128 N. W. 384, the Supreme Court of Iowa supports the rule above stated in the following language of the Court:

"The well-settled rule in this court is that the claim of a foreign receiver to funds of the corporation found in this state will not be recognized even by way of comity if the result would be to relegate the creditors of the corporation in this state to the relief to which they would be entitled in a foreign jurisdiction, when there are funds of the corporation in the state from which such claims may be satisfied."

The declaration of the policy of the State of Iowa with reference to the claim of a foreign receiver to funds of a corporation found in this state is reaffirmed in the case of *Watts* v. *Southern Surety Company*, 216 Iowa 150 at 159, 248 N. W. 347, in the following language of the Supreme Court:

"This is to the effect that domestic assets will not as against domestic creditors be transmitted to a foreign re-

ceiver or liquidator, if there is any danger that the latter's distribution thereof will be made in a manner unfair to the domestic creditors. * * *

"The intervener suggests that the plaintiff's claim be dismissed and that he be relegated to the receivership proceedings in New York for the purpose of presenting his claim. As stated by the rule announced in the case of *Schloss* v. *Surety Co.*, 149 Iowa 382, 128 N. W. 384, 385: 'The well-settled rule in this state is that the claim of a foreign receiver to funds of the corporation found in this state will not be recognized even by way of comity if the result would be to relegate the creditors of the corporation in this state to the relief to which they would be entitled in a foreign jurisdiction, when there are funds of the corporation in the state from which such claims may be satisfied."

This Court in the case of *Clark* v. *Williard*, 292 U. S. 112, 78 Law Ed. 1160, announces and supports the same rule as the decisions of the Supreme Court of Iowa quoted above.

For all the reasons stated the writ of certiorari should be granted and this decision reviewed and reversed.

Respectfully submitted,

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